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In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 367

MORRIS MALINSKI and SIDNEY RUDISH,
Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York and Brief in Support thereof.

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THE PEOPLE OF THE STATE OF NEW YORK,
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Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATES JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Morris Malinski and Sidney Rudish, respectfully represent the following:

Summary Statement of Matter Involved.

Your petitioners, together with Joseph Indovino, were convicted of murder in the first degree, in the County Court, Kings County, New York State, on July 19, 1943, and your petitioners were sentenced to be executed* (Rec., pp. 91-92; 95-96).†

On an appeal to the Court of Appeals of the State of New York, the judgment of conviction was affirmed by a divided

* A stay of execution was granted by the order of Mr. Justice Jackson, dated June 19th, 1944.

† References to pages of Record on Appeal in the Court of Appeals of the State of New York.

court. A motion for a re-argument in the Court of Appeals, returnable June 12, 1944, was denied without opinion on June 14, 1944 (Order of Court of Appeals, June 14, 1944). The petitioners are under sentence of death. Alleged confessions of the petitioner, Morris Malinski, were admitted in evidence over objection and exception by the petitioners, and objection was specifically made, that the admission of such confessions was a denial "of due process" under the Fourteenth Amendment of the Constitution of the United States.*

The remittitur of the Court of Appeals recites that:

> "Questions under the Constitution of the United States were presented and necessarily passed upon.
>
> The defendant Rudish contended that the admission of the confession of his co-defendant Malinski in evidence against Malinski was a denial to the defendant Rudish of due process under the Fourteenth Amendment to the Constitution of the United States.
>
> The defendant Malinski contended that the admission in evidence of his alleged confession and his identification of the 'murder car' and his description of the events at the scene of the murder, violated his rights under the Fourteenth Amendment to the Constitution of the United States.
>
> This Court held that the rights of neither defendant under the Fourteenth Amendment to the Constitution of the United States had been violated or denied."

During the trial a motion was made on behalf of Malinski to set aside the verdict on a number of grounds, among which was "that the Court in admitting the confession in evidence deprived the defendant Morris Malinski of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States; * * * that the de-

* *Vide* Order of the Court of Appeals of New York, dated May 18, 1944, amending remittitur (292 N. Y. 686, Adv. Sheet, No. 274).

fendant Malinski was deprived of due process of law in violation of * * * the Fourteenth Amendment of the United States Constitution by reason of the fact that the arresting officers failed to arraign the defendant Morris Malinski at the time of his arrest before a magistrate having jurdiction to take his examination; * * * that the Court's charge to the jury deprived the defendant Morris Malinski of due process in violation * * * of the Fourteenth Amendment of the United States Constitution".

The motion was denied and an exception duly taken (Rec., pp. 1457-1459).

A similar motion was made on behalf of Rudish upon a number of grounds, among which were "that this defendant was deprived of his constitutional rights" in "that evidence was admitted during the course of the trial which deprived the defendant Rudish of due process in violation of the Fourteenth Amendment of the United States; * * * that the Court's charge to the jury deprived the defendant Rudish of due process of law in violation of * * * the Fourteenth Amendment of the Constitution of the United States". (Rec., p. 1460). The motion was denied and an exception duly taken (Rec., pp. 1462, 1463, 1465).

The jury recommended "life imprisonment" for Indovino, which penalty was imposed. His conviction was not passed upon by the Court of Appeals (292 N. Y. 360, 364) and is not involved herein.

There were two opinions filed by members of the Court of Appeals (292 N. Y. 360).

The opinion upholding the conviction was written by Judge Conway and concurred in by Judges Lewis, Desmond and Thatcher; a dissenting opinion was filed by Chief Judge Lehman, with whom Judges Loughran and Rippey concurred (292 N. Y. 376).

In his dissenting opinion, Chief Judge Lehman said (p. 384):

> "A confession which is not incompetent under the provisions of section 395 of the Code of Criminal

> Procedure is not to be rejected because the accused was unlawfully detained by the police without arraignment for the purpose of obtaining the confession. 'Nevertheless, in determining whether a confession has been obtained as the result of a beating, or is voluntary, the circumstances that it was obtained while arraignment was illegally delayed for no apparent reason except that the police needed a confession in order to have competent proof of the commission of a crime, should be considered by the jury' (Peo. v. Alex, 265 N. Y. 192, 194). We must examine the record in this case to determine if there has been a fair trial in this case of the question whether the confession under the circumstances here disclosed was obtained as a result of threats or violence."

Again, at page 387:

> "Nonetheless, in this case, as in People v. Mummiccai (supra, pp. 399-400),* 'the conclusion is inescapable,' that the police delayed the arraignment of the defendant 'for the purpose of subjecting him to an inquisition impossible thereafter,' at which he might be induced to make a confession by resort to what the Supreme Court of the United States has described as 'those reprehensible practices known as the "third degree," which, though universally rejected as indefensible, still find their way into use.' There can be no fair trial of the issue whether the confession is voluntary where the jury is not properly informed that the detention was unlawful and that they must take that fact into consideration.' That has not been done in this case."

The question involved is whether the admission in evidence of certain confessions of the petitioner, Malinski, was a denial "of due process" under the Fourteenth Amendment of the Constitution of the United States.

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* 258 N. Y. 394.

Details of Crime.

On February 15, 1941, at eleven o'clock, P. M., Leon Fox, a patrolman of the Police Force of the City of New York, was shot and killed. At the time of the homicide he was escorting the manager of Loew's Theatre in Coney Island, Borough of Brooklyn, City and State of New York, to a bank depository. The manager had the day's receipts of the theatre, consisting of seven hundred dollars in bills, and seven rolls of quarters of ten dollars each in a burlap bag. As they approached the depository, a branch of the Brooklyn Trust Company, located at Surf Avenue and West 12th Street, Coney Island (Rec., pp. 127-128), they noticed an automobile parked on West 12th Street, south of Surf Avenue, with the lights out and the motor running. As they reached the vicinity of the car, they were "jumped" by two men, one of whom came out of the automobile; the officer was shot, the bag containing the money taken; the two men entered the car, which sped away at a high rate of speed. None of the occupants of the car, nor the participants in the robbery and killing were ever identified (Rec., fols. 386-393). The petitioners herein, Malinski and Rudish were indicted with Joseph Indovino for the homicide. The testimony against the defendants was given chiefly by David Yellin,* Nathan or Slip Spielfogel† and Samuel Kovner,‡ three criminals then serving time in States Prison.

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* Yellin was serving a term of from 10 to 20 years, for a "stick-up", convicted December 12, 1941 (Rec., p. 221).

† Spielfogel, as a second offender, was under sentence of from 30 to 60 years, for complicity in the same "hold-up" in which Yellin was convicted (Rec., pp. 295, 246).

‡ Kovner was serving a term of from 15 to 30 years for a "stick-up" committed December 15th, 1940 (Rec., p. 679).

The indictment is as follows:

> "The Grand Jury of the County of Kings, by this indictment, accuse the defendants of the crime of Murder in the First Degree, committed as follows:
>
> The defendants, on or about February 15, 1941, in the County of Kings, acting in concert with Abraham Beitler, deceased,** wilfully, feloniously and of malice aforethought, shot and killed Leon Fox, with a pistol" (Rec., p. 11).

The only testimony against the petitioner Rudish, was given by Yellin and Spielfogel (Rec., pp. 221-288; 295-447).

The incriminating testimony consisted very largely of conversations alleged to have been had between Beitler, Yellin and Indovino; Beiter, Indovino and Kovner; Malinski and Spielfogel; and Rudish, Spielfogel and Yellin. The conversations related largely to the planning of the robbery, and those between Rudish and Yellin, and Rudish and Spielfogel as to Rudish's alleged participation in the affair—all of such conversations having occurred immediately subsequent to the homicide (Rec., pp. 221-288; 315-320).

The witness Yellin was held to be an accomplice as a matter of law (Rec., p. 1347).

The Court of Appeals divided, four to three, on whether Spielfogel was an accomplice. The majority of the Court held that whether he was an accomplice was properly submitted to the jury as a question of fact (292 N. Y. 360, at 376); the minority ruled that the evidence established him to be an accomplice as a matter of law, or if not, that the evidence overwhelmingly proved him to be so as a matter of fact (292 N. Y. 360, at 380).

If Spielfogel were an accomplice, Rudish's conviction could not stand, since in New York State a conviction

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** Beitler was dead at the time of the trial (Rec., pp. 679-681).

cannot be had upon the uncorroborated testimony of an accomplice.*

Circumstances Under Which Confessions Obtained.

The testimony establishes that on October 23, 1942, Morris Malinski was living with his family at 714 Hinsdale Street, Brooklyn, N. Y. (Rec., pp. 548; 945). He left his home shortly after 7 A. M. that morning to proceed to work. When he had gone a short distance, he was accosted by two men who put pistols to his head. He was handcuffed, taken to an automobile, placed in it and driven away. He asked if he were being kidnapped and told to keep still. He was driven to the Bossert Hotel, in Brooklyn, a distance of five or six miles. During the drive a number of police stations, police headquarters, the County Court of Kings County, and the office of the District Attorney of Kings County were all passed. No stop was made. The Hotel Bossert was reached at eight o'clock and Malinski was immediately taken to a room where Lieut. McNally was present. Malinski was immediately stripped, naked.†

After being stripped naked at the Bossert Hotel, he was kept that way for a while, and then given his BVD's. Later he was given a blanket. The testimony is conflicting as to the length of time he remained undressed (Rec., pp. 587-588; 607; 595-596); but one officer attached to the district attorney's office, testified that he was still in his stripped condition when he returned to the room in the Bossert Hotel at 3:00 A. M. Saturday morning (Rec., pp. 595-596). The reason assigned by the police for strip-

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* Section 399 of the New York Code of Criminal Procedure provides that "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

† Malinski claims by force; the police say he undressed voluntarily (Rec., pp. 549; 574; 595; 605-606).

ping Malinski was to ascertain whether there were any bullet wounds or scars on his body (Rec., p. 584), although the homicide had been effected twenty months previously (Rec., pp. 11-12). What was found on examining Malinski's body was evidence of twenty-one skin graftings on his chest and abdomen, necessitated by severe burns when he was a child (Rec., pp. 551; 596).

Malinski also testified that while he was still stripped, he was taken to an open window, his clothes placed on the window sill and that the police threatened to throw him out the window (Rec., p. 551). This was denied by the police (Rec., p. 572).

As soon as Malinski was brought to the hotel, Lieut. McNally 'phoned Edward Heffernan, an assistant district attorney, who had been working on the case with the police. Malinski testified that during the afternoon, Heffernan came to the hotel and questioned him about the Fox killing and left in disgust because Malinski denied all knowledge of the affair (Rec., p. 550). Lieutenant McNally testified that Heffernan came to the room where Malinski was, was told who he was, looked at him and walked out without speaking to him (Rec., p. 576). Another highly improbable story—that the public prosecutor, notified of the arrest of a suspect in a murder case on which he was working, merely looked at the suspect and did not question him at the earliest opportunity. Although Heffernan was present in the court room at the trial he was not called as a witness (Rec., pp. 325-326). Malinski claimed that the police had beaten him from time to time during the day, Friday, October 23, 1941 (Rec., pp. 549; 551; 555; 557-558). The police denied it (Rec., pp. 572; 592; 604; 613). Some time in the course of the day, about 5 or 6 o'clock in the afternoon, it is claimed that Malinski made a full confession (Rec., p. 576). No transcript was made of any such confession. Later in the evening, about 9 o'clock, Malinski was questioned in the presence of the Acting District Attorney, Thomas Cradock Hughes, Assistant District Attorney Hef-

fernan, Captain McGowan, Captain Dowdell, and Lieutenant McNally. No record was made of any statements made at that time by Malinski. None of the persons mentioned as being present at that time, ever denied his presence or that what Malinski testified had occurred there had never happened (Rec., p. 851). The following day, Saturday, October 24, 1942, Malinski complained of illness and asked for a doctor (Rec., p. 562). His request was refused (Rec., p. 563). He also requested permission to see a Rabbi, and an assistant district attorney named Nat Math; both requests were refused (Rec., pp. 322; 1254). Some sort of medicine or drug was given to him by one of the police officers to alleviate the stomach condition of which he complained (Rec., p. 596). He was questioned all day Saturday and into the night. The following day (October 25, 1942) he was questioned further and eventually taken to a police garage. It is claimed by the People that he there identified the car which had been used in the affair. He denied doing so, and his conduct substantiates his claim.*

He was questioned further and at length on that and on the following Monday, when he was taken to the scene of the crime (Rec., p. 644). All of this time he was held *incommunicado* in the Bossert Hotel. When Lieut. McNally was asked why, if the police had a complete confession at about five or six o'clock on Friday, October 23rd, that Malinski had participated in the brutal killing of a fellow member of the police department, he was not locked up in jail, McNally answered that Malinski had remained at the hotel of his own volition. That he was given the choice of going to jail or remaining at the hotel, and he chose to remain at the hotel with his "pal," Spielfogel.

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* He was asked to open one of the doors of an automobile claimed to have been the one used. He took his handkerchief from his pocket and grasped the handle with his handkerchief, asking at the same time whether the police were trying to "frame" him by inducing him to do something which would leave his finger prints on the car (Rec., pp. 949-959).

although Spielfogel was locked up in jail every night (Rec., pp. 580-581), while Malinski was kept *incommunicado* in the hotel.

On Monday, the 26th, Malinski was questioned further and was taken in an automobile over the route alleged to have been followed by the killers to the scene of the crime. He was accompanied by detectives and Spielfogel. The People contend that he voluntarily described the actions of the participants preceding the killing and during the "stick-up" during which the homicide was effected. Malinski contends that the information furnished by him was given him by Spielfogel from time to time. That they conversed in Yiddish and that Spielfogel continually urged him to give the answers he suggested, as by so doing Malinski would avoid further ill treatment. About three o'clock in the afternoon of October 26, 1943, the party arrived at the Bath Beach or 62nd Precinct, station house. Malinski was questioned off and on until 2:10 A. M., October 27, 1943, when a statement then made by him as a result of questioning by Assistant District Attorney Hefernan, was taken by a stenographer, and later transcribed (Rec., pp. 552-553; 579).† Then about 5:30 or 5:45 A. M., Tuesday morning, October 27, 1942, after having been held *incommunicado*, from 7:15 A. M. of October 23, 1942, your petitioner, Malinski, was booked, or formally placed under arrest by having a charge entered against him.*

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† Evidently the alleged "full confessions" were unsatisfactory and so the questioning was continued until one was obtained which met the requirements of the police.

* "The defendant must, in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night" (N. Y. Code of Criminal Procedure, Sec. 165.)

Section 1844 of the Penal Law (N. Y.), provides that

> "A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays

"If, as appears plain, they did 'arrest' the defendant Malinski, then his confinement by the police at the Hotel Bossert, or any other place, without prompt arraignment was contrary to the express command of the statutes and was unlawful." (Opinion of Chief Judge Lehman, p. 382.)

Lieut. McNally testified that Malinski was arrested Tuesday morning, October 27, 1942 (Rec., pp. 580; 587).

During the trial, Malinski testified in his own behalf and denied emphatically that the admissions in the alleged confession were true, or that he had participated in any manner whatsoever in the robbery and killing (Rec., pp. 955; 956; 961).

In addition to the oppressive conduct of the police and prosecuting officers, there were other violations of petitioners' rights so highly prejudicial as to deprive them of a fair trial under the Fourteenth Amendment. For instance during the final address of the assistant district attorney remarks were indulged in of so highly a prejudicial and vicious character as to vitiate the trial. There is no dispute as to their indefensible character. All the Judges of the Court of Appeals are in agreement as to their objectionable character. Their impropriety was a denial of that fundamental concept of justice and fairness that are essential to a fair and impartial trial imperative under the Fourteenth Amendment? The remarks and their impropriety are fully set forth and discussed in the brief accompanying this petition (*post*, pp. 21, 22, 25).

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to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor."

In *People* v. *Mummiani* (258 N. Y. 394, 399), it was said:

"The police are guilty of oppression and neglect of duty when they wilfully detain a prisoner without arraigning him before a magistrate within a reasonable time (Code of Crim. Proc., sec. 165). The conclusion is inescapable that they do this for the purpose of subjecting him to an inquisition impossible thereafter."

As to Rudish.

"The conviction of Rudish," said Chief Judge Lehman, in the dissenting opinion, "thus rests upon the testimony of two witnesses who are accomplices as matter of law or, at least, shown to be accomplices by the great weight of evidence. The Trial Judge charged that no 'other evidence' corroborates them. The verdict against Rudish should for that reason be set aside" (*Peo. v. Malinski*, 292 N. Y. 360, 380).

That statement evidences how vital to Rudish was the admission of evidence harmful to him. After proceedings on the *voir dire* to determine whether the alleged written confession of Malinski should be admitted and submitted to the jury, the Court decided to admit the confession. After some discussion, the Court directed that certain names should be deleted and in their places, the designations "X" and "Y" be used (Rec., pp. 618-620).

In the alleged confession, Malinski involved both Rudish and Indovino, and it was those names which the Court directed should be suppressed and for which "X" and "Y" should be substituted. The device was futile. As soon as Malinski was called to testify in his own behalf, a few questions by his counsel developed that "X" and "Y" were respectively Rudish and Indovino (Rec., pp. 953; 962). As said in *Anderson v. United States*, Law Ed. Adv. Opinions, Vol. 87, No. 10, page 589:

> "The government urges that even if the confessions are held to be inadmissible, only the convictions of the six petitioners who confessed should be reversed. The prosecution rested principally on these confessions and the testimony of an informant, Fred Long, whose credibility was under severe attack. The incriminating statement of each petitioner implicated all the others including those who did not confess. *To be sure, the trial court devised a proce-*

dure under which the confessions were introduced without mention of the names of the other persons implicated. But their names were, in fact, revealed in the course of the cross-examination of the confessing petitioners." (Italics ours.)

The only testimony against Rudish was given by Yellin and Spielfogel. Yellin was held to be an accomplice as a matter of law (*ante*, p. 6); the Court of Appeals divided sharply by four to three as to the status of Spielfogel (*ante*, p. 6). Spielfogel was under severe attack as to whether he had been an actual participant in the crime. The confession of Malinski must have had tremendous influence with the jury in determining Rudish's guilt. If it were wrongfully admitted, the conviction of Rudish should not be permitted to stand.

Grounds Upon Which the Jurisdiction of This Court Is Invoked.

It is respectfully submitted that this Court has jurisdiction of this petition for certiorari under Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, section 1 (43 Stat. 937); 28 U. S. C. A., Section 344 (b), such petition being one to review the final judgment of the Court of Appeals of the State of New York in which a decision could be had, rendered April 20, 1944.

The judgment affirmed a judgment for sentence of death (Rec., pp. 91-92; 95-96); and in said Court of Appeals petitioners especially set up and claimed, under the Fourteenth Article of Amendment of the Constitution of the United States, the right, privileges and immunity against being deprived by the State of New York of their rights and liberty without due process of law, "and," as certified by the Court of Appeals, "this point was considered and necessarily decided by this Court" (Order Amending Remittitur, dated May 18, 1944), this point having been specifically presented in the briefs on behalf of Malinski and

Rudish, on the argument of the appeal from the judgment of conviction and death of the County Court of Kings County, New York State, and specifically on the trial.

Reasons Relied Upon for the Allowance of the Writ.

The Court of Appeals of the State of New York has decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court in that the Court of Appeals of the State of New York has affirmed a judgment and sentence of death wherein tested by an appraisal of the totality of the facts in this case (*Betts v. Brady*, 316 U. S. 455, 462), petitioners were deprived of their lives and liberty without due process of law.

See:

Ashcraft v. Tenn., 88 L. ed., Adv. Op., No. 14, 858;
Ward v. Texas, 316 U. S. 547;
McNabb v. U. S., 87 L. ed., Adv. Op., No. 10, 579;
Anderson v. U. S., 87 L. ed., Adv. Op., No. 10, 589;
Lisenbà v. California, 314 U. S. 219;
Chambers v. Florida, 309 U. S. 227;
White v. Texas, 310 U. S. 530;
Vernon v. Alabama, 313 U. S. 547;
Lomax v. Texas, 313 U. S. 544;
Canty v. Alabama, 309 U. S. 629;
U. S. v. Mitchell, 88 L. ed., Adv. Op., No. 13, 812;
Brown v. Mississippi, 297 U. S. 278;
Viereck v. U. S., 87 L. ed., Adv. Op. No. 10, 529;
Pierre v. Louisiana, 306 U. S. 354;
Betts v. Brady, 316 U. S. 455;
Lyons v. Oklahoma, 88 L. ed., Adv. Op., No. 16, 1076.

WHEREFORE, your petitioners, Morris Malinski and Sidney Rudish, pray that a writ of certiorari may issue out of and under the seal of this Court, directed to the Court of Appeals of the State of New York, commanding the said

Court to certify and send to this Court for review and determination, as provided by law, this cause and a complete transcript of the record and all proceedings had herein; and that the order of the Court of Appeals of the State of New York affirming the judgment in this cause may be reversed and that the petitioners, Morris Malinski and Sidney Rudish, may have such other and further relief in the premises as this Court may deem proper.

Dated, August 15, 1944.

MORRIS MALINSKI,
SIDNEY RUDISH,
Petitioners.

JOHN J. FITZGERALD,
DAVID F. PRICE,
JOSEPH A. SOLOVEI,
Counsel for Petitioners.

STATE OF NEW YORK, }
COUNTY OF KINGS, } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

JOHN J. FITZGERALD,
Counsel for Petitioners.

he Supreme Court of the United States

OCTOBER TERM, 1944.

No.

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e two opinions of the Court of Appeals of the State
ew York are officially reported in the weekly advance
s No. 267, June 10, 1944, 292 N. Y. 300. No opinion
handed down on the denial of the motion for re-argu-

Statement of Jurisdiction, Questions Presented, and Facts.

e statement under which the jurisdiction of this Court
voked, of the questions presented, and the factual
er relevant to this application appear in the petition
hich this brief is annexed.

lotion for re-argument denied by the Court of Appeals with-
pinion, June 14, 1944.

Argument.

Petitioners urge that they have been convicted for the crime of murder, and have been sentenced to death as a result of a trial so violative of their constitutional rights as to be a denial to them of the protection of the Fourteenth Amendment of the Constitution of the United States in that they were denied due process of law.

The basis of their contention may be stated in the language of this Court in *Brown v. Mississippi*, 297 U. S. 278, 286:

> "The complaint is not of commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial."

POINTS.

I.

The admission in evidence of Malinski's confession was a violation of the rights of the petitioners under the due process clause of the Fourteenth Amendment of the Constitution of the United States.

The question involved herein is whether the confession of Malinski, on the 27th day of October, 1942, was made under such circumstances as to render it inadmissible under the applicable decisions of this Court, and the due process clause of the Fourteenth Amendment. It is the confession taken on October 27th, by a stenographer at 2:10 A. M., at the Bath Beach station house, with which this Court alone is concerned. While there is testimony that Malinski had made "complete confessions" prior thereto, no attempt was made to prove what Malinski said when

the alleged "complete confessions" were made, and there is no evidence of any admissions made by him at any other time after his apprehension on October 23, 1942, and his detention *incommunicado* in the Hotel Bossert from which to predicate a conclusion that he had confessed; nor was any effort made to prove any admission by him which would constitute a confession.

Whether there is other evidence in the record sufficient to sustain the verdict, regardless of the confession, to which objection was made, is immaterial. If the admission of the confession denied a right to the defendants under the Constitution, such an error requires reversal.

Bram v. *United States*, 168 U. S. 532, 533, 540-42; *Lyons* v. *Oklahoma*, 88 L. ed., Adv. Op., No. 16, 1076.

While there is a conflict in the testimony as to whether Malinski was beaten while in custody to procure a confession, there are certain conceded and undisputed facts which clearly and conclusively establish that the confession was extorted as the result of coercion, duress and illegal acts and conduct by the police and prosecuting officers, which violated the constitutional rights of the petitioners.

It is not denied that Malinski was assaulted by two individuals, subsequently identified as police officers, about 7:15 A. M. on October 23, 1942, immediately after leaving his home, where he was living with his family, and on his way to work. Two strangers "jumped" him, put pistols to his head, put handcuffs on him, told him to keep silent, when he asked if he were being kidnapped, put him into a private automobile and drove away from the vicinity of his home. It is not only not denied, but it is conceded, that he was taken to a private hotel, immediately stripped naked and kept wholly unclothed, and later partially clothed for a considerable time. It is admitted that numerous (21) skin graftings were found on his chest and abdomen. The testimony is contradictory as to whether he was beaten while in custody, and whether the police

threatened, while he was partially dressed, to throw him out of a window. It is conceded that he complained of illness and asked for a doctor and none was furnished. It is conceded that he asked to see a Rabbi and an assistant district attorney, and that his requests were denied. It is admitted that he was held *incommunicado* from the time of his arrest at 7:15 A. M. on October 23, until 5:30 A. M. on October 27—a period of four days; that during the time of his detention he was continuously questioned, day and night, by police officials and representatives of the district attorney's office, and that at 2:10 A. M. on the 27th of October, he was questioned; that the questions and his answers were taken by a stenographer, and that he was then "booked" and formally placed under arrest at 5:30 or 5:45 A. M., practically four days after being taken into custody.

The purpose of these proceedings is not a matter of conjecture or speculation. There is neither dispute nor controversy as to the underlying motive of the police and the public prosecutor, and the result sought.

> "Nonetheless," said Chief Judge Lehman, in the dissenting opinion, "in this case, as in People v. Mummiani (258 N. Y. 399, 400), 'the conclusion is inescapable' that the police delayed the arraignment of the defendant, 'for the purpose of subjecting him to inquisition impossible thereafter' at which time he might be induced to make a confession by resort to what the Supreme Court of the United States has described as 'those reprehensible practices known as the "third degree," which, though universally rejected as indefensible, still find their way into use.'"

The mere recital of the facts set forth herein should suffice to establish that the confession was the result of coercion and duress, and was not voluntary. But the petitioners do not rely only upon the foregoing narrative to

ustain their contention that there was a flagrant denial f constitutional rights.

In his summation, the district attorney said:

> "Why this talk about being undressed? Of course they had a right to undress him to look for bullet scars, and keep his clothes off him. That was quite proper police procedure. That is some psychology—let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner; let him think he *was going to get a shellacking*" (Rec., p. 128). (Italics supplied.)

In what plainer terms could an admission be couched that the practices to which the police had resorted were solely to produce such a mental state as to induce the defendant to make any statement desired so as to be relieved of the pressure? And does not such a frank admission of coercion tend rather to strengthen Malinski's claim that he was subjected to physical abuse as well as to mental terror?

Again, the district attorney said:

> "Malinski was held and he was allowed to sleep there.* He could not get away. When McNally was asked, 'did you place him under arrest?', he probably meant he did not book him right away. *They hold men for several days.*† Are you satisfied with that? They are not going to let him go home, or let him get hold of a smart mouthpiece to preach about his rights and to sue out writs. You want a district attorney who is worth his salt, not a powder puff district attorney. When you are trying a case of murder, especially murder of a police officer, you don't go over and give him a pat on the back and

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* Referring to Malinski's detention at the Hotel Bossert.

† Such action is in violation of the New York statute—§ 165 of the Code of Criminal Procedure, *ante*, p. 10.

> say: "Do you want anything? Do you want to have your lawyer, or your wife, or somebody else?" In fact after they would not let him see Mr. Math, an assistant in our office, they would not let him talk to a Rabbi. Do you think that McNally, 17 years in the Police Department, is going to let this jerk from the East Side tell him his business?" (Rec., p. 1254).

In view of the long and historical struggle to establish and protect fundamental rights which are sacred to Anglo-Saxon civilization can a more shocking and incredible statement be imagined?

Commenting upon the foregoing, and other passages in the district attorney's summation, Judge Conway, in the prevailing opinion (292 N. Y. 360, 373), said:

> "The remarks were indefensible."

Chief Justice Lehman, in the dissenting opinion, said (389):

> "We are loathe to believe that the police did actually act as the Assistant District Attorney says they did. We certainly cannot say that they did not do so, and we should not hesitate to reverse a judgment which is the result of a trial at which a jury was led to believe that such practices were lawful and proper."

A further excerpt is as follows:

> "Just imagine! Down there on that bleak, winter's night, Patrolman Fox trying to do his duty in the face of these hoodlums who were out there in Coney Island from the lower east side of Manhattan, *where your life is not worth a pretzel.*" (Emphasis ours.) (Rec., p. 1258).

It is a notorious fact of common knowledge, that in the region of the City of New York, usually referred to as the "East Side," there are hundreds of thousands of Jewish

people. They are decent, thrifty, industrious, law-abiding and patriotic. Of course some of the residents of that section at times commit crimes and are in conflict with law. It is not an uncommon thing for attempts to be made to create the impression that all of the inhabitants of the East Side are criminals, and because of their race and religious beliefs are an undesirable element of the community. The whole tenor of the "indefensible" remarks of the assistant district attorney was a brazen appeal to racial and religious prejudice, highly prejudicial to these defendants—both of whom are Hebrews—designed to have the jury convict defendants because of their race rather than on the evidence.

The Court was in agreement as to the outrageous and inexcusable character of the assistant district attorney's statements.

The majority took the position that although counsel had interrupted the summation a number of times, that they were so little impressed by the offensive character of the remarks, they made no objection to them. Chief Judge Lehman pointed out, however, that exception was taken by motion for a mistrial. Under the practice in New York State, in a capital case it is not essential for review by the Court of Appeals that an exception be taken. The Court has power to reverse for error, whether any objection be made or exception be taken.* But the question was not, as Judge Conway seemed to assume, whether the remarks were such as to impress counsel with their impropriety. The important question is, were they harmful to the defendants? If they were, it was the duty of the Court to give such relief to the defendants as the situation required.

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* Section 528 of the New York Code of Criminal Procedure is in part as follows: "* * * When the judgment is of death, the Court of Appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence, or against the law, or that justice requires a new trial, whether any exception shall have been taken in the court below."

Moreover, the Trial Court was not without responsibility in the premises. It was under an obligation to act. The trial judge is not supposed to act the Sphinx. His duty is not passive—it is affirmative. He is there not only to preside, but to see that the trial is conducted fairly and impartially and in accordance with the fundamental concepts of fairness and justice. This Court, in *Viereck* against the *United States*, *supra*, commenting upon certain remarks of the prosecuting attorney said:

> "In his closing remark to the jury, he—the prosecuting attorney—indulged in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice. The trial judge overruled, as coming too late, petitioner's objection first made in the course of the Court's charge to the jury. * * * We think the trial judge should have stopped counsel's discourse, without waiting for an objection."

In *N. Y. C. R. Co.* v. *Johnson*, 279 U. S. 310, 316, 318, the following appears:

> "The public interest requires that the Court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion and prejudice."

In *People* v. *Wolf*, 183 N. Y. 464, 472:

> "An unfair trial especially in a criminal case, is a reproach to the administration of justice, and casts grave responsibility not only upon the prosecuting officer but also upon the trial judge. * * * we have repeatedly laid down the rule governing prosecuting officers in addressing the jury and to govern trial judges also in their duty relating to the subject. We have repeatedly admonished both, the former at times with severity and the latter more mildly, not to depart from that rule, but our admonitions have not

always been regarded, although they were followed by reversal of the judgment involved, founded solely on the remarks of the prosecuting officer and the failure of the trial judge to do his duty in reference thereto."

Cf.

People v. *Esposito*, 220 N. Y., 370;
People v. *Manganaro*, 218 N. Y., 9, 17;
People v. *Mull*, 167 N. Y., 247;
People v. *Fielding*, 158 N. Y., 542.

In *People* v. *Conroy*, 200 N. Y., 356, 369, considerable adverse testimony had been elicited in the cross-examination of the defendant and subsequently stricken out by the Trial Court. The Court of Appeals said:

> "It is not always an easy thing for a jury to eliminate from his memory the effect of damaging statements made in his presence. * * * In this case, where the defendant's life is involved, we are unwilling to take the responsibility of saying that the statements and charges of Monat erroneously received, although stricken out, did not affect the result."

The Trial Court did not interrupt the District Attorney at any time during his "indefensible" remarks, nor did he at any time or in any manner point out in his charge the objectionable and inexcusable character of them, and advise the jury to disregard them and not to be influenced by them. Whatever prejudicial impression the remarks may have made upon the jury no attempt was made to eradicate the improper impression by the one whose duty it was to prevent such results.

This Court has emphatically and in no unmistaken terms condemned such conduct by the prosecuting attorney.

In *Berger* v. *U. S.*, 295 U. S. 78, 88, Mr. Justice Sutherland, speaking for the Court, said:

> "The United States attorney is the representative not of an ordinary party to a controversy, but of a

> sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interests, therefore, in a criminal prosecution, is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that the guilty shall not escape or innocent suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

This language was quoted with approval in *Viereck* v. *U. S.*, *supra*.

Again, let us quote from the remarks of the district attorney:

> "Of course they had a right to undress him to look for bullet scars, and keep his clothes off him. That was quite proper police procedure. That is some psychology—let him sit around with a blanket on him, humiliate him there for a while; *let him think he was going to get a shellacking.*" (Italics ours.) (Rec., p. 1283.)

As said in *People* v. *Pantano*, 239 N. Y. 416, 419:

> "A threat may be implied as well as expressed and the fear engendered is alike in each case."

The assistant district attorney frankly boasted that the procedure adopted was intended to instill a belief that physical force was to be applied to Malinski. Under the circumstances, the mental condition resulting was the same as if the force were actually used. While there is contradictory testimony as to whether physical force was actually applied, there is no dispute that the procedure followed was intended to have the same effect.

In *United States* v. *Mitchell*, 88 L. ed., Adv. Op., No. 13, 812, 815 (decided April 24, 1944), Mr. Justice Reed said:

> "As I understand McNabb v. United States, 318 U. S. 332, as explained by the Court's opinion today, the McNabb rule is that where there has been illegal detention of a prisoner, joined with other circumstances which are deemed by this Court to be contrary to proper conduct of Federal prosecutions, the confession will not be admitted. * * * In my view, detention without committment is only one factor for consideration in reaching a conclusion as to whether or not a confession is voluntary. The juristic theory under which a confession should be admitted or barred is bottomed on the testimonial trustworthiness of the confession. If the confession is freely made, without inducement or menace, it is admissible. If otherwise made, it is not, for if brought about by false promises or real threat, it has no weight as proper proof of guilt."

While it is recognized that the rule in the *McNabb* case, *supra*, thus interpreted applies only to cases in the Federal Courts, and the power to review cases in State Courts, is more restricted and limited (*McNabb* v. *United States*, *supra*), yet the petitioners herein contend that there is here both conceded illegal detention and coercion and duress of the most flagrant character.

The Defendants Having Seasonably Asserted That Their Constitutional Rights Have Been Denied Resulting in a Judgment of Death, This Court Is Required to Make an Independent Examination to Ascertain Whether the Convictions Have Resulted From the Use of Confessions Improperly Obtained.

The petitioners have seasonably asserted their rights. The amended remittitur of the New York Court of Appeals sets forth that defendants' claim that they were denied due process of law under the Fourteenth Amendment was raised and

necessarily passed upon by that Court (*ante*, p. 2).* The record on appeal to the Court of Appeals discloses that the questions were raised on the trial in the Court below (*ante*, pp. 2, 3).

This being a capital case this Court is not bound by the finding of the Court, or the jury, or of both. It is under the solemn duty to make an independent investigation to determine the facts for itself.

In *Chambers* v. *Florida*, 309 U. S. 227, 228, it is said:

> "* * * use by a state court of an improperly obtained confession may constitute a denial of due process of law as guaranteed in the Fourteenth Amendment. Since petitioners have seasonably asserted the right under the Federal Constitution to have their guilt or innocence of a capital crime determined without reliance upon confessions obtained by means prescribed by the due process clause of the Fourteenth Amendment, we must determine independently whether petitioners confessions were so obtained by review of the facts upon which that issue necessarily turns."

In *Lisenba* v. *California*, 314 U. S. 219, 240, it is said:

> "* * * we think it right to add that when a prisoner held incommunicado is subjected to questioning by officers for long periods and deprive of the advise of counsel, we shall scrutinize the record with care to determine whether, by use of his confession, he is deprived of his liberty or life through tyrannical or oppressive means."

In *Pierre* v. *Louisiana*, 306 U. S. 354, 358:

> "* * * when a claim is properly asserted * * * that a citizen whose life is at stake has been denied the equal protection of his country's laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts—for equal protection to all is the basic principle upon which justice under the law rests."

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* 292 N. Y. 686, Adv. Sh., 274.

In *Ward* v. *Texas*, 316 U. S., 547, 550, the Court said:

> "Each State has the right to prescribe the tests governing the admissibility of a confession. In various States there may be various tests. But when, as in this case, the question is properly raised as to whether a defendant has been denied the due process of law guaranteed by the Federal Constitution, we cannot be precluded by the verdict of a jury from determining whether the circumstances under which the confession was made were such that its admission amounts to a denial of due process."

In *Ashcraft* v. *Tenn.*, 88 L. ed., Adv. Op., No. 14, 858, speaking of the duty of the Supreme Court to make an independent examination to determine whether a confession was voluntary, the Court said:

> "Our duty to make that examination could not have been foreclosed by the finding of a court, or the verdict of a jury or both."

Considering the circumstances under which Malinski's confession was obtained, as hereinbefore set forth, the language of this Court in *White* v. *Texas*, 310 U. S. 530, 533, is peculiarly pertinent:

> "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death."
>
> *Chambers* v. *Florida*, 309, U. S. 227, 288.

In *Betts* v. *Brady*, 316 U. S. 455, 462, it is said:

> "Due process of law is secured against invasion by the Federal Government by the Fifth Amendment and is safeguarded against state action in identical words in the Fourteenth Amendment. The phrase formulates a concept less rigid and more fluid than

those envisaged in the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of the facts in a given case."

In the instant case every device condemned by this Court as obnoxious to the Constitution were all employed to obtain Malinski's confession. Summarized they are: arrest without warrant; an assault with firearms; threats to keep silent; a spiriting away to a hotel, instead of a jail, during which numerous police stations, police headquarters, the County Court House and district attorney's office were passed; stripped naked, upon a flimsy pretext that it was desired to ascertain if there were bullet wounds or scars twenty months after the affray; held incommunicado from 7:15 A. M. October 23rd until 2:10 A. M. October 27th; repeatedly questioned day and night; denied medical attention when requested; denied opportunity to consult a Rabbi or an assistant district attorney, with the conceded purpose of preventing advice or assistance from friends and counsel—the only thing disputed being physical violence—mental coercion being conceded. What more could be done, or must be done, to establish that a confession is involuntary?

To use Mr. Justice Holmes illuminating expression the petitioner was subjected to a pressure that can only be properly characterized as "hydraulic".

Northern Securities v. *United States*, 193 U. S., 197, 400:

> "The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of 'mental freedom' to confess or to deny a suspected participation in a crime. * * * When concealed facts exist which are irreconcilable with such mental freedom, regardless of the contrary conclusions of the triers of fact, whether judge or jury, this Court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands."

> (Mr. Justice Reed, in *Lyons* v. *Oklahoma*, 88 L. ed., Adv. Op., No. 16, 1076.)

As to Failure to Arraign Without Unnecessary Delay.

In a note, page 10, *ante*., Section 165, of the New York Code of Criminal Procedure, requiring a defendant to be taken before a Magistrate without unnecessary delay is set forth.

Somewhat similar statutes govern federal procedure.†

Arraignment of the defendant herein without "unnecessary delay" was a question of law to be determined by the Court. A jury may not speculate upon the motives of the police in failing to arraign promptly. There may be situations where there is unavoidable delay, *i.e.*, inability to locate a magistrate or illness of the prisoner. It is a matter of common knowledge, however, that in the City of New York, magistrates are always available. They sit every day. There are night courts held by them. No issue was presented that magistrates were not available during the period of detention. The purpose of delaying arraignment in order to secure a satisfactory confession was conceded. It was the duty of the Trial Court to advise the jury as a matter of law that the failure to arraign Malinski from the time of his arrest on October 23rd until October 27th, was a flagrant violation of law. The Court did not do so.

The charge on that question is as follows:

> "* * * I charge you that it was the duty of the police to arraign the defendant before the nearest magistrate without unnecessary delay, and, further,

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† "It shall be the duty of the marshall, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States Commissioner, or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail" (18 U. S. C. A., Sec. 595).

The Act of June 18, 1934, c. 595, 48 Stat. 1088; 5 U. S. C. A., sec. 300 A, authorizing officers of Federal Bureau of Investigations to make arrests, requires that, "the person arrested shall be immediately taken before a committing officer".

that if a police officer failed or refused to perform such duty, he is guilty of a misdemeanor.

But, gentlemen, you will bear in mind that the police department is not on trial in this case. This testimony was adduced solely on the question as to whether or not the alleged confession later made, was the result of the coercion, either direct or implied, which is prohibited by the statute, and which invalidates a confession, if made. If you should find that the arraignment of the defendant was delayed, you may consider that on the question of the voluntariness of any confession made by Malinski, including the one made in the early hours of October 27, at the Bath Beach station house.

However, I am charging you that the failure to arraign in and of itself, is not conclusive against the People, and does not of, and in itself, standing alone, destroy the validity of the confession. Is that clear?"

It is respectfully submitted that the charge was erroneous and grossly inadequate. It was not for the jury to speculate as to whether there had been "unnecessary delay", in the arraignment. The fact was so overwhelmingly established, that the jury should have been so advised. They should have been further instructed that such a flagrant violation of law on the part of the police *must* be seriously and carefully weighed in determining whether the confession of October 27th was voluntary. It should have been pointed out that only after repeated questioning, day and night, for four days, did the police obtain such a confession as they were willing to have transcribed. The jury should have been told to consider well whether the delay in arraignment was to obtain the sort of confession desired and necessary to involve Malinski. As Chief Judge Lehman pointed out *(ante*, p. 20) that "the conclusion is inescapable that the police delayed the arraignment for the purpose of subjecting the defendant to pressure thereafter impossible". Moreover, the charge minimizes the importance of a prompt arraignment of a perisoner and must have been exceedingly

misleading to the jury. As Chief Judge Lehman said (292 N. Y. 360, 387):

> "There can be no fair trial of the crime whether the confession is voluntary, where the jury is not properly informed that the detention was unlawful and they must take that fact into consideration. *It has not been done in this case.*
>
> It is true that in the charge of the Court, the jury was informed that 'it was the duty of the police to arraign the defendant before the nearest magistrate, without unnecessary delay, and further if a police officer failed or refused to perform such duty, he is guilty of a misdemeanor, and if you find that the arraignment of the defendant was delayed, you may consider that on the question of the voluntariness of any confession made by Malinski including the one made in the early hours of October 27th, at the Bath Beach Station House. That instruction is not sufficient where, as in this case, the evidence produced by the People, conclusively shows that the police flagrantly disobeyed the express mandate of the law. Even if there had been a question in this case, that the delay in arraignment was not "unnecessary" within the meaning of section 165 of the Code of Criminal Procedure, that question was not properly submitted to the jury'."

No clearer analysis of the circumstances under which the issue of whether the voluntary nature of the confession was adequately and properly submitted to the jury is possible. The jury was never properly instructed on the applicable law; it was impossible to have an intelligent discussion and decision under the circumstances.

Controlling Decisions.

This case comes squarely within *Ashcraft* v. *Tenn.*, *supra*. There is a striking similarity between the cases. It would serve no useful purpose to detail at length the facts established in the *Ashcraft* case. Suffice to say that there ap-

peared to have been continuous questioning by experienced lawyers and police officials; that he was held incommunicado for thirty-six hours without sleep or rest. "The Constitution of the United States stands as a bar", said the Court, "against the conviction of any individual in an American Court by means of coercion".

The conceded and proven facts in the instant case, hereinbefore specifically set forth, disclose a situation more flagrant and indefensible than that shown in the *Ashcraft* case. No novel rule is asserted by the petitioners. Their rights under the Constitution have been unlawfully invaded. They invoke its protecting aegis, that their lives may not be forfeit by such unconscionable and vicious practices as were indulged in herein.

Other decisions that support petitioners' contentions and justify the writ sought are:

Ward v. *Texas*, 316 U. S., 547;
Lisenba v. *California*, 314 U. S., 219;
Chambers v. *Florida*, 309 U. S., 227;
White v. *Texas*, 310 U. S., 530;
Vernon v. *Alabama*, 313 U. S., 547;
Lomax v. *Texas*, 313 U. S., 544;
Canty v. *Alabama*, 309 U. S., 629;
Brown v. *Mississippi*, 297 U. S., 278;
Pierre v. *Louisiana*, 306 U. S., 354;
Betts v. *Brady*, 316 U. S., 455;
Lyons v. *Oklahoma*, 88 L. ed., Adv. Op., No. 16, 1076.

Conclusion.

The killing of patrolman Leon Fox was a dastardly inexcusable, abhorent murder. Its perpetrators should be punished. They deserve no sympathy, they should receive no mercy. The wisdom of the maxim "*Justitia fiat, ruat coelum*" is neither challenged nor deprecated. Considering the present world-wide abnormal conditions punishment for crime should be swift and exact. Convictions, however, should be in accordance with law. The fathers wrought

better than they knew when they incorporated those invaluable safeguards for the life and liberty of our people which are found in the Constitution. Inherent in our criminal procedure are definitely recognized foundamental concepts of justice, fairness and impartiality, precious to our Anglo-Saxon civilization, which cannot be evaded merely to secure victims for punishment. The law instinctively looks upon confessions by the accused with suspicion. The methods frequently used to obtain them, in violation of constitutional rights, are too well known, and have been so often and emphatically condemned by this and other courts, as to require no enumeration. The Nazi system of justice, with its concomittant methods of inducing confessions, has no place in our jurisprudence and should never be given a beachhead.

A calm and dispassionate examination of the record herein, and of the circumstances under which Malinski's confession was procured, disclose a process abhorent to those foundamental concepts of fairness and justice, characteristic of our criminal procedure, and repellent to every element of impartiality.

Important it is indeed to punish crime; but far more imperative is it that our criminal procedure be not polluted with foreign methods, alien to our concept of justice and inconsistent with our system of government.

So conclusively apparent does the record disclose an invasion of the petitioners' rights under the Fourteenth Amendment, that the intervention by this Court to prevent a gross miscarriage of justice, and the execution of petitioners as a result of practices condemned by it, is imperative.

We respectively pray that the petition for certiorari be granted.

Respectfully Submitted,

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Counsel for Petitioners.

Appendix A.

United States Constitution, Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix B.

Judicial Code of the United States, Section 237 (b), as Amended, 28 U. S. C. A., Section 344 (b).

It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United

States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

Appendix C.

Section 165 of the Penal Law of the State of New York.

The defendant must in all cases be taken before the magistrate without unnecessary delay.

Appendix D.

Section 399 of the Code of Criminal Procedure of the State of New York.

A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime.

Appendix E.

Section 1844 of the Penal Law of the State of New York.

A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such a person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor.

Appendix F.

Section 528 of the Code of Criminal Procedure of the State of New York.

When the judgment is of death, the Court of Appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence, or against the law, or that justice requires a new trial, whether any exception shall have been taken or not in the Court below.

Appendix G.

Section 595, United States Code of Criminal Procedure, Title 18, United States Code (1940 Ed., Vol. 2).

It shall be the duty of the Marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States Commissioner or the nearest judicial officer having jurisdiction under the existing laws for a hearing, commitment, or taking bail for trial. * * *

Appendix H.

Section 300 A of Title 5, United States Code (1940 Ed., Vol. 1, p. 124).

The Director, Assistant Directors, agents, and inspectors of the Division of Investigation of the Department of Justice are empowered to serve warrants and subpoenas issued under the authority of the United States; to make seizures under warrant for violation of the laws of the United States; to make arrests without warrant for felonies which have been committed and which are cognizable under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that the person so arrested is guilty of such felony and where there is a likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing officer. Such members of the Division of Investigation of the Department of Justice are authorized and empowered to carry firearms.